



State of Colorado

Office of the Alternate Defense Counsel

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I am the Deputy Director of Alternate Defense Counsel, the statewide conflicts office in Colorado for Public Defender conflicts. As you know, Colorado has a Unitary Review system in death penalty cases. Currently, we have 2 cases that are proceeding under the URA.

You have asked me to delineate the conflicts that arise when there are one or more death penalty cases that come within the purview of the URA. I have done that below, but let me begin by saying that when Colorado passed the URA, the stated purposes of the URA were two-fold: First, the cases would be concluded more quickly and second, therefore, the cases would be cheaper. One can also hope that an additional purpose would be that the outcomes would be reliable and that the URA it's self would not be the subject of a reversal of the conviction in Colorado. Although neither of our current URA cases are anywhere near completion, I believe that in the end, based on how the cases have gone already, the cases are clearly more expensive, are far beyond the time limits stated in the statute, and many more issues have been injected into the cases *because* of the URA than have been solved.

I propose the following hypothetical to show the myriad of conflicts that arise *simply because of the URA*.

MURDER 1 (chronologically)

4 Codendants. Def. A, B, C, D

Each has 2 lawyers: A1 A2, B1 B2, C1 C2, D1 D2

Defendant C and D plead out to something (they may or may not testify)

Defendants A and B go to trial and are convicted. Death is not sought in Murder 1.

MURDER 2

2 Codefendants, A and B

Def. A has the same lawyers A1 A2 and A3 is added do to the request for death. Based on our experience, it is a much ethically cleaner situation *if new lawyers are on Murder 2, especially if Murder 1 conviction is an aggravator*. I have done so, A3, A4. A5.

Def. B has B3, B4. B5.

Both def. go to trial and have separate trials.

At the conclusion of each trials, Def. A receives the death penalty and Def B receives the death penalty.

POST CONVICTION: From the day of conviction all A lawyers and all B lawyers are conflicted because the post conviction action begins immediately. A new team of lawyers is required. Because of the time limits, it is necessary for this team to work fulltime and the team must be large enough to do the work in the short time allowed. There must be one or more death qualified lawyers on this team according to ABA standards and Colorado Rules. At least 3 lawyers are recommended, we currently have 4. These 3 lawyers cannot have any ethical conflicts and must be squeaky clean in terms of having no potential conflicts with any other lawyers, witnesses, etc, in Murder 1 (all codefendants) and Murder 2. I shall refer to the new PC team as A6, A7, A8 and B6, B7, B8.

DIRECT APPEAL: From the day of conviction a direct appeal team must be assembled, with the qualifications above. This team will also be subject to strict time limits and so the team will likely have to be 3 qualified lawyers, working nearly fulltime on the appeal. Again, this team cannot have any conflicts, of any kind with the lawyers on any of the other cases or codefendants. **Note, there will likely be a direct appeal in Murder 1 going on at the same time. IF the Direct appeal lawyers in the Death Case also do the direct appeal in Murder 1 (clearly an aggravator in the Death Penalty case), which would financially seem

like a smart decision, this team could or will likely become the subject of a separate post conviction action in the Murder 1 case. Should this happen, there is a serious risk that the Direct appeal team could be removed *during* their work on the direct appeal of the death case. To avoid this, it would be advisable to have yet another team of appellate lawyers on the direct appeal of Murder 1 for both codefendants, A and B. (see chart below, A16, A17 and B16, B17)

Some of the inherent conflicts that occur when a post conviction action *and* a direct appeal parallel are listed here:

- waivers, defendant is deemed to waive certain privileged information for the purposes of post conviction matter but at the same time, the defendant has a direct appeal action pending that he certainly should *not* have to release or waive attorney client privilege. * (*Note, A13 and B13 on chart below are independent counsel that has been appointed by the court to advise the Defendant regarding matters- such as waivers/conflicts among different team responsibilities etc. This area continues to unfold as these cases progress.)
- There is an inherent struggle between PC counsel who may want to argue an issue such as Issue X was not preserved for the purposes of appeal and ergo ineffective assistance on the part of trial counsel **and** at the same time direct appeal counsel wants to raise that same issue on appeal and must argue that the issue *was* preserved.
- PC counsel will be in the trial court litigating the Defendant's post conviction petition and therefore making decisions, essentially in a vacuum, about what issues to raise NOW. For example, PC counsel may decide to raise a number of IEC claims as to Murder 1 (which was used as an aggravator in the Death Penalty case, Murder 2) and therefore the ultimate PC team in Murder 1, may have to say that PC team in Murder 2 was ineffective for raising those claims in the Death PC petition and should have allowed those claims to be raised in the PC of Murder 1 – or that Death PC team did any other actions that impacted the Murder 1 petition. AND, if the Death Direct appeal team does the direct appeal in Murder 1, then the Murder 1 PC team must investigate any possible IAC claims against Death Direct App. Counsel,

thereby potentially compromising their continued representation.

- Under the Colorado URA, in the event that the Death PC petition is denied, PC counsel and Direct Appeal counsel file their appeal together or share a brief. (It is likely that the Death PC lawyers are not appellate lawyers and should the PC petition be denied, additional lawyers will have to be added. These are represented by A14, A15 and B14, B15.) This provision alone is the sources of many issues. With page limits and 2 teams with differing responsibilities – there is the potential for much conflict. I offer an example: Imagine that DA (direct appeal team) wants to use 10 pages of the valuable brief space to raise an issue that they argue **was** preserved. PCA (post conviction appeal team) asserts that DA should not/cannot do that because PC team argued that the issue **was not** preserved and this amounted to IAC and that is now an issue they are appealing in PCA part of the brief. This is a simple but very realistic example of the types of problems created by this part of the URA.

This list is by no means exhaustive. It is intended to show you how complicated it is to **use** the URA, no matter what the intentions of the URA.

In addition, as you can see, each case can and should take about 20 non-conflicted lawyers. Several lawyers will have already been involved in Defendants C and D and there will always be witnesses that are involved in the criminal justice system than or now. In our current cases, I have a running list of lawyers who are ethically conflicted through other defendants, witnesses, consultations, etc. – which I **know** about and the list is well over 60 attorneys in the Denver metro area.

Our current URA cases have already made 2 trips to the Colorado Supreme Court and one trip to federal court. Based on our policy regarding pending cases, I am unable to give you information at this time about the cost of these cases in any detail.

And last, please keep in mind that the Office of the Public Defender, the most affordable representation will very likely be excluded from all URA representation. They will have been the trial counsel on either the

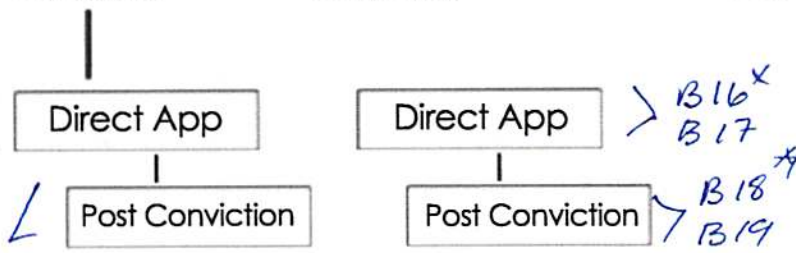
first conviction, or the death conviction, and therefore you will be looking at panel lawyers to do all the URA work – by the hour! I hope that this has been informative and you should feel free to contact me if you require more information.

Sincerely Yours,

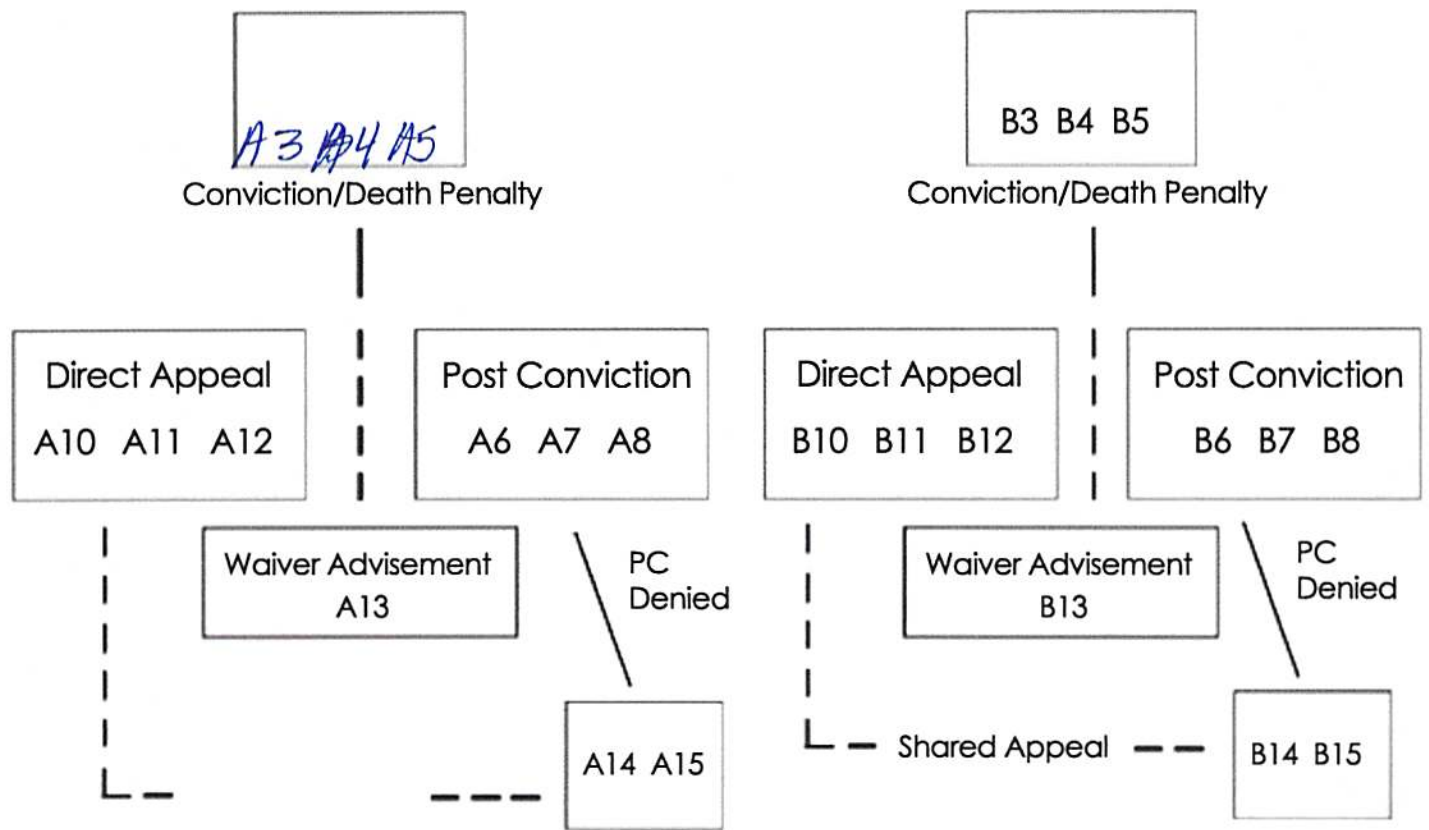
Bert Nieslanik

Roberta “Bert” Nieslanik
Deputy Director
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Murder 1-4 CO \triangle



Murder 2 - Death Case A + B



* A16-19 and B16-19: THE ONLY WAY TO ENSURE NO CONFLICTS with A10-A12 is to have A16+17. OF COURSE A18+19 ARE NECESSARY AS P.C. FOR MURDER 1.